

REMARKS

Claims 1-3, 6 and 8-20 stand rejected under 35 U.S.C. 103(a) as being unpatentable Axelrod, et. al. in view of Wang. The Examiner cites to paragraph 5, paper number 072104 for what Axelrod, et. al. teach and to paragraph 3 and paper 063005 for what Wang teaches. No paper number 063005 could be located in the file. Regardless, the following comments regarding this rejection are provided. This rejection is respectfully traversed. Axelrod, et. al. teach a chew toy generally as set forth by the Examiner. But, and importantly, there is no disclosure of the use of animal meat as defined in the claims hereof. There is a disclosure of animal meal but the meaning of this phrase is unknown given the context of this reference. No meaning has been provided by the Patent Office. The primary goal appears to be the inclusion of the vitamins and minerals and other nutrients in a chew toy. Axelrod, et. al. teach the inclusion of hydrolyzed collagen having a particle size of 20 mesh. Wang is similarly deficient in its teaching. Starting at line 20 and column 2, it is required that the structure of Wang be completely edible and biodegradable. Still further, in column 2 starting at line 36, the thermoplastic is made from a combination of plant and animal derived proteins which appears to be a misuse of the term thermoplastic. No disclosure is found in this patent relating to the use of meat. It would appear that the preferred proteins are plant proteins. There is no disclosure of any particle size in this patent. While animal proteins are disclosed, they do not include meat, but rather include casein, albumin, collagen, gelatin, and keratin. See the paragraph bridging columns 5 and 6.

The basis provided by the Patent Office for the rejection is that it would be obvious to find the optimum animal meal (not meat) particle size and optimum molding parameters and that

such work would require nothing more than routine experimentation by one reasonably skilled in the art. This conclusion is apparently based on the Examiner's personal knowledge. It is respectfully requested that the Examiner provide an affidavit under 37 C.F.R. 1.104(d)(II) to support the Examiner's knowledge of what was known at the time the invention was made. In addition, it is respectfully requested that the Examiner identify who is one skilled in the art at the time of invention. The Examiner's attention is directed to the requirements for an obviousness rejection set forth in MPEP 2144.03(A) and (B) and in addition MPEP 2144.04(BI) which have not been followed in this rejection. It is submitted that the Patent Office has not established that the invention is obvious or is a matter of routine experimentation. Rather, it is submitted that the obviousness rejection is based on forbidden hindsight, given the teaching of the present invention. A teaching, motivation or suggestion must be found in the references to render the claims obvious over the cited references. Further, there is no suggestion in these references of many of the claimed elements. In particular, the type of protein (meat) and its particle size. If the specific type of protein is not taught, then its particle size would not be obvious from the combined references. There is simply no teaching in the cited references of any criteria about how to make a meat containing animal chew toy with the animal meal disclosure and, especially the particle size in the animal product and the moisture content. In fact, it appears that the disclosure of the animal meal is nothing more than a general comment meant to expand the scope of the disclosure regarding the detailed disclosure of the animal chew toy containing nutraceuticals, such as vitamins, minerals and herbs. Without some suggestion or direction in these references for their combination or for them to be combined to produce the invention, given the lack of disclosure of certain of the claimed elements, these references simply will not support an obviousness rejection.

The dictates of Section 2144 of the MPEP do not appear to have been followed to properly support the rejection. The Examiner's attention is additionally directed to *Ex Parte Chicago Rawhide Manufacturing Co.*, 223 U.S.P.Q. 351 (Board of Patent Appeals and Interferences 1984) where the Board held that it is improper for the Patent Office to rearrange elements in a manner different from the disclosed arrangement to support an obviousness rejection. The Board further held "the mere fact that a worker in the art could rearrange the parts of the reference device to meet the terms of the claims on appeal is not by itself sufficient to support a finding of obviousness. The prior art must provide a motivational reason for the worker in the art, without the benefit of appellant's specification, to make the necessary changes in the reference device." Further, the Court of the Customs and Patent Appeals in *In re Ahlert*, 424 F.2d 1088 (CCPA 1970) held "assertions of technical facts and areas of esoteric technology must always be supported by a citation or some reference work recognized as standard in the pertinent art and the applicant must be given, in the Patent Office, the opportunity to challenge the correctness of the assertion or the notoriety or repute of the cited reference. . . . allegations concerning specific "knowledge" of the prior art, which might be peculiar to a particular art should be supported and the appellant similarly given the opportunity to make a challenge." In this case, the Examiner has concluded, improperly, what one skilled in the art would or could do and has cited to no reference supporting this conclusion or who one skilled in the art might be (see the *Graham* factors). Further, the Federal Circuit in *In re Zurko*, 258 F.3d 1379 (Fed. Cir. 2001) stated "[w]ith respect to core factual findings in a determination of patentability, however, the Board cannot simply reach conclusions based on its own understanding or experience - - or on its own assessment of what would be basic knowledge or common sense. Rather, the Board must point to some concrete evidence in the record in support of these findings. To hold

otherwise would render the process of appellate review for substantial evidence on the record a meaningless exercise.”

Thus, given the fact that these rejected claims all contain limitations not disclosed by either Axelrod, et. al. or Wang, they simply will not support an obviousness rejection as they currently stand.

Claim 4 stands rejected as being obvious over Axelrod, et. al. in view of Wang as set forth in the first portion of the rejection and further view of Gluck et. al. Gluck, et. al. adds nothing more to the teaching of the two principle references except the teaching of avoiding the use of animal products in such chew toys. See for example column 1, lines 26-30. Regardless, Gluck, et. al. do not teach how to practice the present invention and does not use any copolymer in its formula. The fact that it discloses the use of cartilage does not add to the teaching of the other two references. Regardless, Claim 4 depends from an allowable claim and thus is patentable for this reason alone.

Claims 1 and 12 stand rejected as being indefinite. This rejection is respectfully traversed. Claims 1 and 12 are not meant to be Markush type claims and thus are in proper form and have been amended to make this clear.

At best, Wang and Axelrod, et. al. are nothing but an invitation to experiment with no direction on how to make a chew toy for a pet having as one component a copolymer and meal as another component. While the teachings may make it obvious to try meat as an ingredient with the defined particle sizes, it does not make it obvious to use meat or substitute meat for one of the other ingredients in these two references. Obviousness to use is the test, not obviousness to try. There is simply no direction in neither of these references to the present invention. The only direction is through the application of forbidden hindsight. Additionally, it is respectfully

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submitted that all of the claims have not been properly rejected. For example, the specific types of meat claimed in Claim 3 are not addressed. Neither are all the limitations in Claims 9, 10 or 11. Additionally, many of the limitations contained in Claims 13-20 have also not been specifically addressed as required.

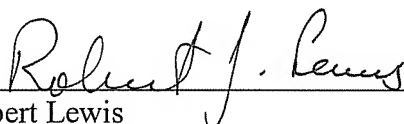
It is respectfully requested that the Patent Office reconsider and withdraw the rejections of the claims for the reasons stated above.

Applicant's request for extension of time under 37 CFR 1.136(a) as well as Applicant's petition fee are enclosed herewith and filed simultaneously with this response.

If any issue regarding the allowability of any of the pending claims in the present application could be readily resolved, or if other action could be taken to further advance this application such as an Examiner's amendment, or if the Examiner should have any questions regarding the present amendment, it is respectfully requested that the Examiner please telephone Applicant's undersigned attorney in this regard.

Respectfully submitted,

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